Supreme Court, U.S.
FILED
AUG 6 1998
CLERK

No. 97-1337

In the

Supreme Court of the United States

October Term, 1997

STATE OF MINNESOTA; Minnesota Department of Natural Resources; RODNEY SANDO, Commissioner of Natural Resources; ARNE CARLSON, Governor of Minnesota; RAYMOND B. HITCHCOCK, Assistant Commissioner of Operations, Minnesota Department of Natural Resources,

Petitioners,

v.

MILLE LACS BAND OF CHIPPEWA INDIANS; et al.,

Respondents,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF JOHN W. THOMPSON, JENNY THOMPSON, JOSEPH N. KARPEN, LEROY BURLING, GLENN THOMPSON, GARY M. KIEDROWSKI, MICHAEL SHEFF AND ROBERT L. EDMONDS IN SUPPORT OF PETITIONERS

Stephen G. Froehle, Esq.
7588 Jeanne Drive
Lino Lakes, Minnesota
55014
(651) 784-2693

GARY E. PERSIAN, ESQ.
Counsel of Record
Randy V. Thompson, Esq.
PERSIAN, MacGREGOR & THOMPSON
1530 International Centre
900 Second Avenue South
Minneapolis, Minnesota 55402
(612) 339-6733

Attorneys for Respondents John W. Thompson, Jenny Thompson, Joseph N. Karpen, LeRoy Burling, Glenn Thompson, Gary M. Kiedrowski, Michael Sheff and Robert L. Edmonds

1998 – Bachman Legal Printing ■ (612) 339-9518 ■ 1-800-715-3682 ■ Fax (612) 337-8053

BEST AVAILABLE COPY

QUESTIONS PRESENTED

The petition addresses whether "[t]he privilege of hunting, fishing, and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded, . . . guarantied to the Indians, during the pleasure of the President of the United States" contained in an 1837 treaty with the Chippewa, art. 5, 7 Stat. 536 (PA 486), continues to exist. The questions presented are:

1) Whether the privilege was effectively revoked by the 1850 Presidential Order of President Zachary Taylor, which states "[t]he privileges granted temporarily to the Chippewa Indians,. . . by the Fifth Article of the Treaty . . . of July 1837 . . . are hereby revoked" (PA 565).

2) Whether the 1837 treaty privilege was extinguished by the 1855 treaty, 10 Stat. 1165, whereby the Chippewa agreed to "fully and entirely relinquish and convey to the United States, any and all right, title, and interest, of whatsoever nature the same may be, which they may now have in, and to any other lands in the Territory of Minnesota or elsewhere" (PA 503), under this Court's holding in Oregon Dept. of Fish and Wildlife v. Klamath Indian Tribe, 473 U.S. 753 (1985).

3) Whether the 1837 treaty privilege was extinguished when Minnesota was admitted into the union on an equal footing with the original thirteen states pursuant to its Enabling Act of May 11, 1858, 11 Stat. 285 (PA 515).

PARTIES

The caption lists all Petitioners in No. 97-1337, all of whom were defendants at the district court level and appellants at the Eighth Circuit Court of Appeals. The caption does not include two other petitioner groups (Nos. 97-1357; 97-1356) who were defendants along with the State of Minnesota at the district court level, and appellants with the State Petitioners at the Eighth Circuit Court of Appeals. The two additional petitioner groups, aligned here as Respondents, include:

1. Landowners: John W. Thompson; Jenny Thompson; Joseph N. Karpen; LeRoy Burling; Glenn Thompson; Gary M. Kiedrowski; Michael Sheff; and Robert L. Edmonds.

2. Minnesota Counties of: Aitkin, Benton, Sherburne, Crow Wing, Isanti, Kanabec, Mille Lacs, Morrison and Pine.

The caption lists one of eight Chippewa Bands that are Respondents along with the United States of America. The additional Respondents include:

Arthur Gahbow; Walter Sutton; Carleen Benjamin; Joseph Dunkley; St. Croix Chippewa Indians of Wisconsin; Lac Du Flambeau Band of Lake Superior Chippewas; Bad River Band of Lake Superior Chippewa Indians; Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin; Sokaogan Chippewa Community; Mole Lake Band, Wisconsin; Red Cliff Band of Lake Superior Chippewa; Fond Du Lac Band of Chippewa Indians; Robert Peacock; Peter DeFoe; Clifton Rabideaux; Herman Wise; George DuPuis.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES ii

TABLE OF AUTHORITIES vi

OPINIONS AND JUDGMENTS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS, TREATIES, AND STATUTES INVOLVED 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 10

ARGUMENT 13

I. THE FEDERAL COURTS LACK JURISDICTION AND PLAINTIFFS' CLAIMS SHOULD BE DISMISSED WITH PREJUDICE 13

II. THE 1850 EXECUTIVE ORDER BY THE PRESIDENT OF THE UNITED STATES REVOKED THE 1837 HUNTING AND FISHING PRIVILEGE. 15

A. The Plain Language of the 1837 Treaty Controls Its Interpretation in the Absence of an Ambiguity 15

B. An Examination of the Historical Context Confirms Congress' Intent was Consistent with the Plain Meaning of the 1837 Treaty. 18

C. The President's 1850 Executive Order Revoking the 1837 Treaty Privilege was Effective, and Judicial Review is Not Available.....20

D. The 1830 Removal Act Cannot Void the President's Action Pursuant to the 1837 Treaty.....21

1. The 1830 Removal Act is Inapplicable to an Executive Order Revoking a Hunting and Fishing Privilege Pursuant to a Treaty Whereby the Chippewa Retained Contiguous, Unceded Lands Including Lands East of the Mississippi.....22

2. Revoking the Privilege Was Entirely Consistent with the Policies Underlying the Removal Act, Even Without Removal, Since the Companion Policy to the Removal Act Dictated that the Indians Who Remained Would be Subject to State and Territorial Laws.....24

E. The President Had Numerous Reasons to Revoke the Privilege in 1850, and His Policy Choices Must be Upheld.....25

F. The Revocation Portion of the 1850 Order is Severable.....29

III. THE 1855 TREATY CEDED ANY REMAINING CLAIM TO THE 1837 PRIVILEGE.....31

A. Factual Background of the 1855 Treaty.....31

B. The Express Language of Cession Relinquished the 1837 Privilege.....32

C. The 1837 Treaty Privilege is an Interest in or to Land, Not an Immunity or Regulatory Right.....33

D. The 1855 Treaty Terms are Consistent with Privilege Relinquishment.....35

IV. THE 1837 TREATY PRIVILEGE WAS EXTINGUISHED NO LATER THAN 1858 WHEN CONGRESS PASSED LEGISLATION ENABLING MINNESOTA TO JOIN THE UNION ON AN EQUAL FOOTING WITH THE ORIGINAL THIRTEEN STATES.....37

A. Congress Did Not Intend the 1837 Treaty Privilege to Operate as an Immunity from Future State Laws.....37

B. The Treaty Privilege was Temporary, and Even if Deemed a Regulatory Privilege, It Cannot Survive Statehood and Restrict Minnesota under Ward and Repsis.....39

C. The Treaty Privilege Was Abrogated by the Subsequent Statute Creating Minnesota as a State, Because Minnesota's Sovereignty Was Not Expressly Limited.....42

D. Minnesota's Right of Dominion and Sovereignty Are Not Diminished by the 1837 Treaty on Lands Within Minnesota's Jurisdiction.....46

CONCLUSION.....48

TABLE OF AUTHORITIES

Cases **Page**

Atha v. Atha, 6 N.W.2d 897 (Mich. 1942) 41

Champlin Rfg. Co. v. Corporation Comm'n, 286 U.S. 210 (1932).....30

Chavez v. Arte Publico Press, 139 F.3d 504 (CA5 1998) ... 43-44

Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831)..... 5-6

Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970).....39, 46

Choctaw Nation of Indians v. United States, 318 U.S. 423 (1943).....35

City of Boerne v. Flores, ____ U.S. ____, 117 S.Ct. 2157 (1997)..... 43-44

Cline v. Southern Ry. Co., 96 S.E. 532 (S.C. 1918).....41

Com. ex rel. Green v. Court of Over & Terminer & Quarter Sessions, Erie County, 106 A.2d 896 (PA Super. 1954) 41

Connecticut Nat'l Bank v. Germain, 503 U.S. 249 (1992) 16

Crow Tribe of Indians v. Repsis, 73 F.3d 982 (CA10 1995), cert. denied 517 U.S. 1221 (1996)..... 38, 39-42, 47

Dalton v. Specter, 511 U.S. 462 (1994)..... 12, 21, 26, 30-31

DeCoteau v. District County Court, 420 U.S. 425 (1975).....16

De Haro v. United States, 72 U.S. (5 Wall.) 599 (1866) 17-18

Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73 (1977).....16

Edye v. Robertson, 112 U.S. 580 (1884) 22

Elk v. Wilkins, 112 U.S. 94 (1884).....38

Fond du Lac Band of Chippewa Indians v. Carlson, No. 5-92-159 (D. Minn. Mar. 18, 1996) 1

Fong Yue Ting v. United States, 149 U.S. 698 (1893).....43

Ford Motor Co. v. Dep't of Treasury, etc., 323 U.S. 459 (1945).....14

Glidden Co. v. Zdanok, 370 U.S. 530 (1962) 14

Griffin v. Oceanic Contractors, Inc., 458 U.S. 564 (1982).....17

Hagen v. Utah, 510 U.S. 399 (1994).....19, 40

Hanson v. Fergus Falls Nat'l Bank, 65 N.W.2d 857 (Minn. 1954) 34

Harris v. Gillingham, 6 N.H. 9, 23 Am.Dec. 701 (1832) 17

Hynes v. Grimes Packing Co., 337 U.S. 86 (1949) 17

Idaho v. Coeur d ' Alene Tribe of Idaho, ____ U.S. ____, 11 Ct. 2028 (1997).....44

In re Cherokee Tobacco, 78 U.S. (11 Wall.) 616 (1870)..... 22, 43, 45-46

Jones v. Meehan, 175 U.S. 1 (1899).....34

Kennedy v. Becker, 241 U.S. 556 (1916)..... 25, 33-34

Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt (LCO I), 700 F.2d 341 (CA7 1983), cert. denied, 464 U.S. 805 (1983) 19, 42

Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin (LCO II), 760 F.2d 177 (CA7 1985) 28, 42

Matter of Reyes, 910 F.2d 611 (CA9 1990) 30

McGrath v. Kristensen, 340 U.S. 162 (1950) 14

Menominee Indian Tribe of Wisconsin v. Thompson, 943 F.Supp. 999 (W.D. Wis. 1996) 34, 36

Mille Lacs Band of Chippewa Indians v. Minnesota, 853 F.Supp. 1118 (D. Minn. 1994) (Mille Lacs I) 1, 16

Mille Lacs Band of Chippewa Indians v. Minnesota, 861 F.Supp. 784 (D. Minn. 1994) (Mille Lacs II) 1

Mille Lacs Band of Chippewa Indians v. Minnesota, No. 3-94-1226 (D. Minn. March 29, 1996) (Mille Lacs III) 1

Mille Lacs Band of Chippewa Indians v. Minnesota, 952 F.Supp. 1362 (D. Minn. 1997) (Mille Lacs IV) 1, 37

Mille Lacs Band of Chippewa Indians v. Minnesota, 124 F.3d 904 (CA8 1997) (Panel Op.) (Mille Lacs V) 1, 22

Minneapolis Mill Co. v. Minneapolis & St. Louis Ry. Co., 53 N.W. 639 (Minn. 1892) 17-18

Minnesota v. Hitchcock, 185 U.S. 373 (1902) 43

Mole Lake Band v. United States, 139 F.Supp. 938 (Ct. Cl. 1956), cert. denied, 352 U.S. 892 18

Navajo Tribe of Indians v. State of New Mexico, 809 F.2d 1455 (CA10 1987) 10

Negonsott v. Samuels, 507 U.S. 99 (1993) 16-17

New York v. United States, 505 U.S. 144 (1992) 44-45

North American Comm. Co. v. United States, 171 U.S. 110 (1898) 37-38

Oregon Dept. of Fish and Wildlife v. Klamath Indian Tribe, 473 U.S. 753 (1985) ..... i, 16, 25, 32-35

Otoe and Missouria Band of Indians v. United States, 131 F.Supp. 265 (Ct. Cl. 1955), cert. denied, 350 U.S. 848 (1955) 10

Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212 (1845) 47

Printz v. United States, ____ U.S. ____, 117 S.Ct. 2365 (1997) 44-45

Red Lake Band of Chippewa Indians v. Minnesota, 614 F.2d 1161 (CA8 1980), cert. denied, 449 U.S. 905 (1980) 32-33

Rosebud Sioux Tribe v. Kniep, 430 U.S. 584 (1977) 19

Rubin v. United States, 449 U.S. 424 (1981) 16

Savage v. S. Dist. Co., 228 S.W.2d 122 (Tenn. App. 1949) 41

Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996) 44

Solem v. Bartlett, 465 U.S. 463 (1984) 31

South Dakota v. Yankton Sioux Tribe, 522 U.S. ____, 118 S.Ct. 789 (1998) 35, 38

State v. Keezer, 292 N.W.2d 714 (Minn. 1980), cert. denied, 450 U.S. 930 (1981) 28-29, 42

State v. Mallory, 83 S.W. 955 (Ark. 1904) 34

State v. Rodman, 59 N.W. 1098 (Minn. 1894) 38

State ex rel. Ohsman & Sons Company, Inc. v. Starkweather, 7 N.W.2d 747 (Minn. 1943) 38

State Farm Fire & Casualty Co. v. Tashire, 386 U.S. 523 (1967) 14

Twisdale v. Womack & Martel, 148 So.2d 21 (Fla. 1962) 41

United States v. Alcea Band of Tillamooks, 329 U.S. 40 (1946) 16

United States v. Bouchard, 464 F.Supp. 1316 (W.D. Wis. 1978) aff'd in part and rev'd in part sub nom. Lac Courte Oreilles Band v. Voigt, 700 F.2d 341 (CA7 1983), cert. denied, 464 U.S. 805 (1983) 19

United States v. Choctaw & Chickasaw Nations, 179 U.S. 494 (1900) 15-16, 21

United States v. Corrick, 298 U.S. 435 (1936) 14

United States v. Dann, 470 U.S. 39 (1985) 10

United States v. Lopez, 514 U.S. 549 (1995) 43

United States v. Mille Lacs Band of Chippewa Indians, 229 U.S. 498 (1913) 19

United States v. Minnesota, 466 F.Supp. 1382 (D. Minn. 1979), aff'd sub nom. Red Lake Band of Chippewa Indians v. Minnesota, 614 F.2d 1161 (CA8 1980), cert. denied, 449 U.S. 905 (1980) 32

United States v. Oregon, 718 F.2d 299 (CA9 1983) 37

United States v. Pend Oreille Public Utility Dist. No. 1, 926 F.2d 1502 (CA9 1991) 10

United States v. Winans, 198 U.S. 371 (1905) 34, 43

Utah Div. of State Lands v. United States, 482 U.S. 193 (1987) 47

Ward v. Race Horse, 163 U.S. 504 (1896) .....12, 22, ...39-44, 46-48

Washington v. Washington State Commercial Passenger Fishing Vessel Assn., 443 U.S. 658 (1979) 16

Webber v. Lee, 51 L.J.Q.B. 485 (1882) 34

Western Shoshone National Council v. Molini, 951 F.2d 200 (CA9 1991) 10

Wheeling & Lake Erie v. Public Util. Comm. P.A., 141 F.3d 88 (CA3 1998) 14

Whitney v. Robertson, 124 U.S. 190 (1888) 43

Withers v. Buckley, 61 U.S. (20 How.) 84 (1857) 47

Worchester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) 6, 25

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) 20-21, 26

Constitutional Provisions

U.S. Const. amend. X 1, 38, 44

U.S. Const. amend. XI 43

U.S. Const. amend. XIV, §5 44

U.S. Const. art. I, § 8, cl. 3 (Commerce Clause) 43

Federal Statutes and Treaties

Removal Act, May 28, 1830, 4 Stat. 411 ..... 5, 12, 21, 22-25

Act of Sept. 30, 1850, 9 Stat. 944 ..... 1, 4

Act of Feb. 27, 1851, 9 Stat. 570 ..... 2, 4

Act of Dec. 19, 1854, 10 Stat. 598 ..... 1, 8, 31

Act of Feb. 26, 1857, 11 Stat. 166 ..... 1, 9

Minnesota Enabling Act, May 11, 1858, 11 Stat. 285 ... i, 1, 9, 12 ..... 43, 44, 46, 47

Nelson Act, Jan. 14, 1889, 25 Stat. 642 ..... 9, 11, 19

Wyoming Enabling Act, July 10, 1890, 26 Stat. 222 46

Oklahoma Enabling Act, June 16, 1906, 34 Stat. 270 ..... 39, 46

Indian Claims Commission Act, Aug. 13, 1946, 60 Stat. 1049, §§ 2 and 12 ..... 10, 13

25 U.S.C. § 174 23

28 U.S.C. § 1254(1) 1

Treaty of Prairie du Chien, Aug. 19, 1825, art. 5, 7 Stat. 272 ..... 2, 38

Treaty of Dancing Rabbit Creek, Sept. 27, 1830, 7 Stat. 333 39

Treaty with the Chippewa, July 29, 1837, art. 5, 7 Stat. 536 ..... passim

Treaty with the Chippewa, Feb. 22, 1855, 10 Stat. 1165 ..... i, 1, 7-9, 31, 36

Treaty with the Crow Indians, May 7, 1868, art. 4, 15 Stat. 649 39-40

Executive Order

Executive Order, President Zachary Taylor, Feb. 6, 1850 ..... passim

Other Sources

Opinion of the Attorney General of the United States, April 20, 1837 ..... 6, 28

Solicitor for the Dept. of the Interior (Vol. 54, Decisions of the Department of the Interior, p. 418, 1934) 38

1 The State of the Union Messages of the Presidents, 1790-1966, at 309-310 (Fred L. Israel ed., 1966) 24-25

Minnesota Territorial Resolution of 1849 .....2, 7

1 R. Rotunda & J. Nowak, Treatise on Constitutional Law, Substance and Procedure 2d, § 6.7, at 516 (1992).....16, 43

4 Richard R. Powell & Patrick J. Rohan, Powell on Real Property, §34.25, at 34-300 (1998).....34

8 Thompson on Real Property, Thomas Edition, §64.02(a), at 7 (Thomas ed. 1994) 18

Felix S. Cohen, Handbook of Federal Indian Law, 79, 81-83 (1982).....5, 22, 24-25

Francis Paul Prucha, American Indian Treaties, The History of a Political Anomaly, 153 (1994).....17

Documents of United States Indian Policy, 79 (Francis Paul Prucha ed., 2d ed. expanded 1990) 23

2 C. Warren, The Supreme Court in United States History, 189 (1923).....5

Wilcomb E. Washburn, 3 The American Indian and the United States: A Documentary History, 2169 (1973).....24

Thomas Lund, "Early American Wildlife Law," 51 N.Y.U.L. Rev. 703 (1976) 34

OPINIONS AND JUDGMENTS BELOW

The August 26, 1997 panel decision of the Eighth Circuit (PA 1-73)[1] is reported at 124 F.3d 904 (Mille Lacs V). Final judgment was entered at the district court by way of a January 29, 1997 Opinion (Mille Lacs IV, PA 74) which is reported at 952 F.Supp. 1362. The four district court opinions relevant to the questions presented by the Petition are: Mille Lacs I (PA 351-418), reported at 853 F.Supp. 1118; Mille Lacs II (PA 212-350), reported at 861 F.Supp. 784; Mille Lacs III (PA 164-211), unreported; Fond du Lac (PA 419-481), unreported.

JURISDICTION

The Court of Appeals entered its judgment on August 26, 1997 (PA 7). A timely Suggestion for Rehearing En Banc was denied by a 7 to 2 vote on November 17, 1997 (PA 482). On June 8, 1998 this Court granted the State of Minnesota's Petition for Certiorari,[2] invoking jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, AND STATUTES INVOLVED

U.S. Const. amend. X (PA 483); Treaty of July 29, 1837, art. 5, 7 Stat. 536 (PA 486); Treaty of Feb. 22, 1855, 10 Stat. 1165 (PA 502-514); Act of Feb. 26, 1857, 11 Stat. 166 (PA 517-521); Act of May 11, 1858, 11 Stat. 285 (PA 515-516); Act of Dec. 19, 1854, 10 Stat. 598 (PA 532-534); Act of Sept. 30,

---

[1] References herein to "**PA**" are citations to the Appendix which was filed with the State of Minnesota's Petition. "**JA**" refers to the Joint Appendix accompanying the State's brief on the merits.

References herein to "**LA**" refer to the Landowners' Appendix filed at the Eighth Circuit level by these Respondents.

[2] These Respondents are eight landowners who filed a separate Petition (No. 97-1357) which is pending.

1850, 9 Stat. 944 (PA 522-527); Act of Feb. 27, 1851, 9 Stat. 570 (PA 528-531); Executive Order of President Taylor, Feb. 6, 1850 (PA 565); Minnesota Territorial Resolution of 1849 (PA 566-568).

STATEMENT OF THE CASE

In July, 1837, near Fort Snelling, Minnesota, Ojibwe[3] Bands gathered to treat with the United States. This was not their first treaty.[4] The 1837 treaty negotiations were attended by at least 1,000 members of the Bands, their leaders, representatives of government, traders, and missionaries (JA 45, 1062; PA 230). The tribal leaders and the United States officials would meet in council, and then break so the Indians could confer among themselves and their allies. (JA 45, 49-50). In addition to the official interpreters, numerous persons in attendance were bilingual (JA 1060-64) including traders, persons of mixed race (then commonly called half breeds), and missionaries. The Bands first offered to lease the lands to the United States[5] but this offer was rejected by Wisconsin Territorial Governor Henry Dodge who countered:

> your Great Father, never buys land for a term of years. I will agree on the part of the President that you shall

[3] "Ojibwe" is the traditional name for the "Chippewa." The Department of Interior currently uses the term "Chippewa," as do the Bands in their official name designations.

[4] In 1825 these Ojibwe entered into the Treaty of Prairie du Chien, 7 Stat. 272, a treaty designed to separate the hunting l. nds of the Dakota and Ojibwe to reduce continuing warfare between them by separating them geographically. For nearly 200 years prior, these Bands were in contact with French and British groups (PA 223).

[5] (JA 1065); 1837 Treaty Journal (JA 71). This 60 year proposed lease, with the United States to renegotiate with the Tribe's children, is evidence of the Ojibwe's knowledge and sophistication in land conveyance (JA 1065-66).

> have the free use of the rivers, and the privilege of hunting upon the lands you are to sell to the United States, during his pleasure. If you sell these lands, you must sell them as all the other nations of Indians have done;...

1837 Treaty Journal (JA 73-74). The next day, on July 28, 1837, Governor Dodge stated:

> I will make known to your Great Father, your request to be permitted to make sugar, on the lands; and you will be allowed, during his pleasure, to hunt and fish on them. It will probably be many years, before your Great Father will want all these lands for the use of his white Children.

Id. (JA 78). One missionary in attendance later suggested problems if removal was attempted "before five years" (JA 99). This missionary understood that the time would come when the President would revoke the privilege, and the Chippewa would be required to remove to their unceded lands (JA 99).

When revoking the privilege in the 1850 Executive Order, President Taylor referred to the privilege as "temporar[y]" (PA 565). Whether "temporary," "probably many years," until wanted "for the use of" white settlers[6], "five years," or even the rejected "sixty years" of lease, the passage of 160 years has long ago passed all these measures of duration. There is no evidence or suggestion whatsoever in the 1837 Treaty Journal that the President's authority to revoke the treaty privilege was limited by an Indian "misbehavior" standard or a requirement of Chippewa removal. (JA 45-93, 1624, 968, 978, 989).

[6] Virtually all public domain lands in the 1837 ceded territory in Minnesota have been conveyed out of the public domain by the United States and most public land in the territory, including the Mille Lacs Band trust lands, were once privately owned (see JA 928-930).

The idea that the land use privilege would go on forever is undermined by the statements of Chief Flatmouth:

> My Father, if it was my land you was buying, I would, instead of an annuity for only 20 years demand one from you, as long as the ground lasted. You know that without the lands, and the Rivers & Lakes, we could not live. We hunt, and make sugar, & dig roots upon the former, while we fish and obtain Rice, and drink from the latter.

(1837 Treaty Journal, JA 80). See, Newell Report (JA 954-63).

The Chippewa language was able to convey the 1837 treaty's plain meaning that the privilege lasted "as long as the President allows or as long as the President permits" (JA 1185-86). The language contained separate word combinations for "forever" and "perpetual" (JA 1177-78). While in isolation, "guarantee" might mean "to set firm" (JA 1179), if the meaning of the "guarantee" in the 1837 treaty was translated in conjunction with "during the pleasure of the President" there would be "probably hundreds" of words available to translate the concept (JA 1179-80) such as "promised for a time," "until the President says" (JA 1179-87), or "some time of a limited duration" (JA 1192-93). No record exists of how the 1837 treaty was translated into Ojibwe (JA 1169).

On February 6, 1850 President Taylor issued an Executive Order specifically revoking the 1837 treaty privilege (PA 565). Congress passed legislation in September of 1850 and February of 1851 appropriating funds to carry out the Order (9 Stat. 944, 9 Stat. 570 [PA 525, 530]). There is no record of any subsequent executive order rescinding the 1850 Order (JA 1054, 1113; PA 263). In the 1950s, the Fond du Lac and Wisconsin Bands participated in Court of Claims litigation and filed pleadings with the Court claiming:

1. "A temporary right to remain in the [1837] ceded area during the pleasure of the President was granted to these Indians. This right was terminated by Executive Order of February 6, 1850. No other action was required to terminate this temporary right" (JA 572).

2. "This privilege [1837] was clearly temporary in character . . . ." (JA 569).

3. "This privilege of hunting, fishing and remaining in the ceded areas (granted to these Indians temporarily) was terminated by Executive Order of February 2, 1850. . . ." (JA 570).

4. "The order of February 6, 1850, was never revoked nor extended" (JA 1521).

Nevertheless, the district court stated that, "[t]he evidence shows that the only reason that the 1850 Executive Order included language extinguishing the hunting, fishing, and gathering privilege was to facilitate removal of the Chippewa . . ." (PA 310). The Circuit Court concluded that "there is no evidence that revocation of usufructuary rights would have been made independently of the removal mandate" (PA 29-30).[7]

The 1837 treaty was negotiated in the aftermath of the constitutional debate and crisis[8] regarding state sovereignty over Indian tribes. President Andrew Jackson's forceful support of the 1830 Indian Removal Act, fueled by the states' assertion of

---

[7] The Circuit Court did not address the district court's conclusions that removal had been suspended, and that privilege revocation required Indian misbehavior. (See fn. 21, infra)

[8] "These laws led to a conflict among the Cherokee Nation, the State of Georgia, the United States Supreme Court, and the President that became one of the greatest constitutional crises in the nation's history."

Felix S. Cohen, Handbook of Federal Indian Law, at 81 (1982); see also 2 C. Warren, The Supreme Court in United States History, 189 (1923).

sovereign control over Indian tribes and lands within a state's borders, collided with Chief Justice John Marshall's decisions in Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831) and Worchester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); (JA 952). Against the background of this great national debate in the early 1830s, Congress ratified the 1837 treaty which purchased land while providing the Chippewa with a privilege revocable by the President. (JA 1446). If the 1837 treaty privilege was not subject to state regulation, then the privilege revocation by President Taylor in 1850, in view of Wisconsin's statehood in 1848 and Minnesota's formation as a territory in 1849, resolved a sovereignty issue of constitutional implication.

The record contains substantial evidence of valid reasons for the 1850 Order's revocation of the privilege stemming from federal land alienation policies, which drove federal Indian policy (JA 1411, 1925, 1430-31). The President authorized all land sales and issued all federal land patents (JA 1408; 933; 1911-14).[9] The 1850 Executive Order was issued "to remove the occupancy and use rights that had been temporarily granted to the Chippewa in 1837 . . . to facilitate selling the public domain by removing any aboriginal claims to the title to such lands . . ." (JA 1925-26) so lands could be sold and settlement encouraged. The survey, sale, and patent process was inconsistent with, and terminated, the treaty privilege. (JA 1049-50, 913, 926-27). An April 20, 1837 Opinion of the Attorney General of the United States confirms that the issuance of land patents terminated any pre-existing Indian use rights (JA 40-41).

The Executive Order of 1850 revoking the privilege was entirely consistent with the 1837 treaty negotiations. The Chippewa were told that it would "probably be many years,

[9] The land patent granted by President Cleveland in 1895 to one of these Landowners' predecessor in title with respect to property in the 1837 territory, expressly provided: "TO HAVE AND TO HOLD the same, together with **all** the rights, **privileges**, immunities and appurtenances of whatsoever nature, thereunto belonging, unto the said John Colson and his heirs and assigns, **forever**." (PA 549) (emphasis added).

before your Great Father will want all these lands for the use of his white Children." (JA 78). The population of Wisconsin had increased one thousand percent between 1840 and 1850[10]. The survey and sale process had already begun in Minnesota (JA 914-18), and settlers would want to purchase land knowing that any privilege given the Indians to hunt, fish and gather wild rice was at an end. (JA 936, 1055, 1305-06, 1393-94, 1443).

The land survey and sale process was a core function of the Presidency in the 1800s, and represented, along with the military, the furthest reaches of federal power. The land survey and sale process drove federal Indian policy, not the reverse. (JA 1411, 1430-31, 1925, 1393-94). The Minnesota Territorial Legislature passed a resolution October 24, 1849 asking the President to revoke the 1837 hunting and fishing privileges "to ensure the security and tranquility of the white settlements. . ." (PA 567). Territorial Governor Ramsey toured Minnesota, gathering information on conflicts between white settlers and the Chippewa, before traveling to Washington to lobby President Taylor to issue the Executive Order. (JA 1132-36). No record exists of President Taylor's reasons for issuing the 1850 Executive Order (JA 1139). These facts support the President's decision to revoke the privilege: (a) resolution of sovereign control issues; (b) reducing settler/Indian conflicts; (c) facilitating the survey and sale of the lands; and (d) expanding American settlement.

The authorizing statute for the 1855 treaty, 10 Stat. 598, called for the "extinguishment of [Chippewa] title to all of the lands owned and claimed by them in the Territory of Minnesota and State of Wisconsin" (PA 532). The Act provided that "[t]he laws of the United States and the Territory of Minnesota shall be

[10] In 1830, the Territories of Wisconsin and Minnesota had a population of about 5,000. By 1840 there were 31,000 people in the Wisconsin Territory. Between 1840 and 1850, Wisconsin's population increased from 30,945 to 305,391 (JA 1524). The 1840s were a watershed period for Minnesota's settlement. From 1849 to 1858, Minnesota's non-Indian population exploded to 150,000. (JA 1441, 1449-50).

extended over the Chippewa Territory in Minnesota whenever the same may be ceded, and the same shall cease to be 'Indian country' . . . ." 10 Stat. 598 (PA 533). The Mille Lacs Band entered into the 1855 treaty, 10 Stat. 1165 (PA 502), and accepted a reservation while agreeing that the Chippewa would settle in one place, cultivate the soil, open farms, build houses, and educate their children (PA 513). The Chippewas' lead negotiator, Hole-In-The-Day, was convinced that the Chippewa would live in poverty if they did not change their habits and ideas of acquiring wealth (JA 301). During the 1855 treaty negotiations, he stated:

> We want to change our habits and customs and live like the whites. . . .You want us to work, to change our habits, and live like the whites, and I see the benefit of your advice, and so do the chiefs.

(JA 335).

> It is very essential that the Indians shall be thrown on their own resources. The country is getting scarce of game, and we cannot get along without changing our habits. We have tried the old system, and found it wanting. We should therefore try a new one.

(Hole-In-The-Day statement, JA 348).

By Article 1 of the 1855 treaty the Indians "fully and entirely relinquish and convey. . .any and all right, title and interest, of whatsoever nature. . .which they **may now have** in. . .Minnesota or elsewhere" (PA 503)(emphasis added). The Circuit Court found that the absence of a specific reference in the 1855 treaty to the relinquishment of the 1837 treaty privilege meant that the federal government did not intend to extinguish the hunting and fishing privilege by the 1855 cession and neither the federal government nor the Bands understood the 1855 treaty to have that effect (PA 35-36).

On February 26, 1857, Congress authorized the people of the Territory of Minnesota to form a constitution and state government, 11 Stat. 166 (PA 517). On May 11, 1858, Congress acted as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the State of Minnesota shall be one, and is hereby declared to be one, of the United States of America, and admitted into the Union on an equal footing with the original States in all respects whatever.

11 Stat. 285 (PA 515)(emphasis in original).

The Acts admitting Minnesota as a State into the Union are silent on any limitations on the power and sovereignty of the State of Minnesota to regulate the taking of fish and game by all persons, as a result of the treaty of 1837.

In 1889 Congress passed the Nelson Act, 25 Stat. 642 (PA 535), calling for the cession and relinquishment of all Chippewa reservations in Minnesota except for White Earth and Red Lake. The consent of the Chippewa Bands was obtained, and the cessions were approved by the President on March 6, 1890 (JA 389-493). During the Nelson Act negotiations on October 4, 1889 with the Mille Lacs Band, U.S. Commissioner Henry Rice was asked about off-reservation hunting.

> **MUH-ENG-AUNCE** . . . Another thing - about the wild animals. If an Indian wishes to go **outside of the reservation to hunt** deer, will he be allowed to do so in the hunting season?. . .
>
> **MR. RICE** . . . In regard to hunting deer, **that is a matter for the Legislature of the State to determine**. You can hunt deer in any event, wherever you find them during the season set apart for hunting; and wherever the white man

may hunt, your young men will have the same right to do so. . . .

(JA 471-472) (emphasis added).

President Franklin Roosevelt, on March 1, 1938, wrote to the Bad River Chippewa Band confirming that the 1850 Order revoked the 1837 treaty privilege (letter at PA 575). In 1946 Congress enacted the Indian Claims Commission Act, 60 Stat. 1049 (PA 550) which created a Commission with exclusive jurisdiction (PA 378-79) and powers to resolve all Indian claims against the government once and for all.[11] Through their tribes, these Bands filed claims at the Indian Claims Commission alleging interference with their 1837 hunting and fishing privilege, later amending their Petition to include claims for all unconscionable consideration under the 1837 treaty.[12] The hunting and fishing privilege at issue was part of the consideration for the 1837 cession, and in 1974 these Chippewa Bands were awarded over nine million dollars in damages by the Commission (PA 383) for their 1837 treaty claims (See Petition [pending] in No. 97-1357).

SUMMARY OF ARGUMENT

The Landowners submitting this brief intervened in this action as representatives of individuals who own lands and businesses in the twelve county Minnesota portion of the 1837 ceded territory. Tracing the title to their lands to patents issued

[11] (PA 379); See Otoe and Missouria Band of Indians v. United States, 131 F.Supp. 265 (Ct. Cl. 1955), cert. denied, 350 U.S. 848 (1955) (legislative history of effort to pass ICCA); Navajo Tribe of Indians v. State of New Mexico, 809 F.2d 1455 (CA10 1987); United States v. Dann, 470 U.S. 39 (1985); United States v. Pend Oreille Public Utility Dist. No. 1, 926 F.2d 1502, 1508 (CA9 1991).

[12] Western Shoshone National Council v. Molini, 951 F.2d 200 (CA9 1991) (Indian Claims Commission proceeding barred subsequent treaty based hunting and fishing claim).

by the United States or Minnesota, these Landowners depend upon or are impacted by a multimillion dollar hunting and fishing tourism industry. Landowners seek to preserve and protect the quality of Minnesota's natural resources so that they can be equally shared for the benefit of all residents of Minnesota.

This action was initiated by Chippewa Bands who seek to reestablish an **off-reservation** hunting and fishing privilege, based upon the 1837 treaty, that was extinguished in the 19th Century.

The treaty privilege, granted when the Chippewa ceded the lands in question, permitted the Chippewa to continue to hunt and fish "during the pleasure" of the President (PA 486). The Chippewa were told that it would "probably be many years, before your Great Father will want all of these lands for the use of his white Children." (JA 78). This privilege was revoked in 1850 by an Executive Order (PA 565) issued by President Taylor pursuant to the authority explicitly delegated by Congress. Congress affirmed President Taylor's Order by twice appropriating funds to carry out its terms. (PA 522, 528).

To eliminate any doubt regarding Chippewa claims to this Minnesota land, when the Chippewa made additional cessions in the 1855 treaty, the United States negotiated an additional provision containing the "express language of cession" whereby the Chippewa ceded all interest in and to land of any kind or nature whatsoever in the State of Minnesota. (PA 502, 503). During the 1889 Nelson Act negotiations, the Mille Lacs Band was told that off-reservation hunting was subject to the laws of the Legislature of Minnesota. (JA 471-72). These decisions were reaffirmed numerous times by federal officials.[13] President Franklin Roosevelt's letter in 1938 carefully reviewed the terms of the 1837 treaty (7 Stat. 536) and the 1850 Executive Order of President Taylor before advising the Chippewa that these

[13] See note 15, infra.

> privileges temporarily reserved. . .were revoked by Order of the President. . .. Therefore, the Indians who hunt or fish. . .outside of their reservation. . .are amenable to the State game laws. . .

(PA 575-76).

Numerous Presidents supported the land survey and sale process, and granted patents to citizens providing the purchasers with "all the rights, privileges and immunities. . .forever." (PA 549). The opinions below reject the decisions of the two Presidents who addressed the issue, substituting a judicial judgment for the decision expressly reserved to the President in the 1837 treaty. The lower courts ignored this Court's directive that when decision making is committed to the discretion of the President by statute, "judicial review of the President's decision is not available." Dalton v. Specter, 511 U.S. 462, 477 (1994).

The lower courts voided the President's 1850 Order by holding that the President could not order the Chippewa to remove from the lands they had ceded except by complying with the 1830 Removal Act. (PA 24-27). The 1830 Removal Act (JA 20) did not apply because the Bands did not exchange lands, and were ordered to relocate to unceded Chippewa lands which remained both east and west of the Mississippi. The portion of the 1850 Executive Order revoking the 1837 privilege is supported by a reason other than removal of the Chippewa -- the Order is self-justified because it resolved the core issue in this suit: which sovereign controls the use of natural resources in the 1837 ceded territory.

When Minnesota became a state in 1858, the Enabling Act was silent on the 1837 privilege, eliminating any special hunting and fishing right under the equal footing doctrine. Ward v. Race Horse, 163 U.S. 504 (1896). The 1837 privilege, characterized by President Taylor as "granted temporarily," was so "precarious" that it had been revoked by Executive Order and relinquished by the 1855 treaty, even before Minnesota's Enabling Act in 1858. (PA 515).

The decisions below conflict fundamentally with this Court's precedents. If not reversed, this case foreshadows the rewriting of Indian treaties whereby hunting and fishing rights are transformed into an exemption from regulation that restricts on a piecemeal basis a State's sovereignty over its lands. The lower courts failed to apply the plain, unambiguous language of the treaties and statutes; substituted judicial decision making for the discretion expressly reserved to the President; and diminished Minnesota's sovereignty 140 years after her admission to the Union on an equal footing "in all respects whatever." The temporary 1837 hunting, fishing and gathering privilege, revoked, relinquished and repealed in the 19th Century, cannot serve to enjoin Minnesota's sovereignty today.

ARGUMENT

I. THE FEDERAL COURTS LACK JURISDICTION AND PLAINTIFFS' CLAIMS SHOULD BE DISMISSED WITH PREJUDICE.

On August 13, 1946 Congress enacted the Indian Claims Commission Act, 60 Stat. 1049 (1946)(PA 550-564), creating a Commission with broad and exclusive jurisdiction to hear claims arising under treaties, laws, executive orders, takings, and for unfair and dishonorable dealing. (PA 550-551). Since these claims of the Chippewa accrued prior to 1946, the federal courts lack jurisdiction under § 12 of the ICCA.

> [N]o claim existing before such date but not presented within such period may thereafter be submitted to any court or administrative agency for consideration, nor will such claim thereafter be entertained by the Congress.

60 Stat. 1049, Sec. 12 (PA 555; see PA 378-9). Contrary to suggestion (PA 378) this portion of the ICCA was never repealed.

These Chippewa Bands were on notice of the claims prior to 1946, confirmed by their Court of Claims pleadings. (JA 569, 570, 572, 1521).[14] In 1938 President Roosevelt wrote to the Bad River Chippewa confirming that the 1850 Executive Order (PA 486) had revoked the 1837 treaty privilege (letter at PA 575).[15]

Congress has forever barred the federal courts or any other forum from hearing these claims. Without negating President Taylor's 1850 Executive Order revoking the privilege, the Bands cannot prevail against the state. The Bands cannot create federal jurisdiction[16] by suing the state to accomplish indirectly what they cannot accomplish directly -- negating an Executive Order. These Chippewa pursued a remedy from the Indian Claims Commission, and they were awarded Nine Million Dollars for their 1837 treaty claims (PA 383).

---

[14] Mille Lacs Band members were arrested for hunting violations in the Minnesota portion of the ceded territory in 1931 (Landowner Trial Exh. 9, LA 2746 [conviction of John Davis]; LA 10053, JA 1240).

[15] In 1920 the Commissioner of Indian Affairs (COIA) advised, "Minnesota can regulate hunting and fishing by the Indians on lands outside of their respective reservations" (JA 1792). In 1939, the COIA said that, "[o]utside their reservations, however, they are subject to the State Laws" (JA 1836; same, 1938 Assistant COIA opinion (JA 1832). See, Department of Interior's 1924 and 1932 circulars [Bands must follow state game laws off-reservation] (JA 1798, and 1809-10; see also, JA 1790, 1792, 1794, 1799, 1801-03, 1827-28; comprehensive analysis by Newell, (JA 1864-1900)).

[16] These landowners made this argument at the district court (PA 378-379) and circuit court (Opening Circuit Court Brief of Thompson, et al., p. 23) and it was raised in their Petition (pending) (Docket No. 97-1357). Jurisdiction can be raised at any time, even sua sponte. United States v. Corrick, 298 U.S. 435, 440 (1936); McGrath v. Kristensen, 340 U.S. 162, 167 (1950); State Farm Fire & Casualty Co. v. Tashire, 386 U.S. 523, 530 (1967); Ford Motor Co. v. Dep't of Treasury, etc., 323 U.S. 459, 467 (1945); Glidden Co. v. Zdanok, 370 U.S. 530, 535-536 (1962); Wheeling & Lake Erie v. Public Util. Comm. P.A., 141 F.3d 88, 92 (CA3 1998).

II. THE 1850 EXECUTIVE ORDER BY THE PRESIDENT OF THE UNITED STATES REVOKED THE 1837 HUNTING AND FISHING PRIVILEGE.

A. The Plain Language of the 1837 Treaty Controls Its Interpretation in the Absence of an Ambiguity.

Article 5 of the 1837 treaty language expressly delegates power to the President to determine the duration of the hunting and fishing privilege granted the Chippewa.

> [t]he privilege of hunting, fishing, and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded, is guarantied to the Indians, during the pleasure of the President of the United States.

(PA 486). The lower courts did not find a textual ambiguity in this treaty language.[17] Despite unambiguous treaty language, the District Court held that the "first rule is that Indian treaties must be construed as the Indians understood them." (PA 301, 193, 102). The Circuit Court held: "We look first at the interpretation understood by the Bands." (PA 36).

The long standing rule, forcefully repeated, is that in the absence of textual ambiguity, the plain meaning of treaty language controls. Indian understanding cannot be utilized to remedy a perceived injustice if it is contrary to the plain meaning of the treaty.

> But in no case has it been adjudged that the courts could by mere interpretation or in deference to its view as to what was right under all the circumstances, incorporate into an Indian treaty something that was inconsistent with the clear import of its words.

---

[17] The Bands' ethno-historian McClurken also testified, "there probably was no deception at the 1837 treaty [negotiations]." (JA 579)

United States v. Choctaw & Chickasaw Nations, 179 U.S. 494, 533 (1900).

> Thus, even though 'legal ambiguities are resolved to the benefit of Indians,' DeCoteau v. District County Court, 420 U.S. 425, 447 (1975), courts cannot ignore plain language that, viewed in historical context and given a 'fair appraisal', Washington v. Washington State Commercial Passenger Fishing Vessel Assn., 443 U.S., at 675, clearly runs counter to a tribe's later claims.

Oregon Dept. of Fish & Wildlife v. Klamath Indian Tribe, 473 U.S. 753, 774 (1985).

Indian treaties are the equivalent of a federal statute for interpretation purposes.[18] When the words of a statute are unambiguous, the "cardinal canon" of determining the plain meaning "is also the last," and "judicial inquiry is complete." Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253-254 (1992) (citing, Rubin v. United States, 449 U.S. 424, 430 (1981)).

This plain meaning rule is compelled by Congress' plenary power in Indian affairs. Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73, 83-84 (1977); United States v. Alcea Band of Tillamooks, 329 U.S. 40, 47 (1946); Mille Lacs I (PA 405). The plenary power of Congress is destroyed if Indian understanding, or a court's "mere interpretation" controls over the plain meaning of a treaty, since the will of Congress, plainly expressed, will not be given full force and effect. Choctaw & Chickasaw Nations, 179 U.S. at 533.

> Our task is to give effect to the will of Congress and where its will has been expressed in reasonably plain terms, that language must ordinarily be regarded as conclusive.

Negonsott v. Samuels, 507 U.S. 99, 104 (1993) (quoting Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 570 (1982)).

The plain meaning of Article 5 of the 1837 treaty can be broken into three parts for analysis.

(1) This was a **privilege**, a permissive license subject to regulation and revocation;
(2) It was of a limited duration ["**during** the pleasure"]; and
(3) The privilege could be revoked by the President at his will ["during the pleasure of the President of the United States"].

The phrase "during the pleasure of" simply, clearly and unambiguously meant the grant of an "at will" power to the President to revoke the privilege.[19] For example, this Court has held that an:

> Indian. . .right of use or occupancy [existing at] the pleasure of Congress or the President. . . .may be terminated by the unilateral action of the United States without legal liability. . .

Hynes v. Grimes Packing Co., 337 U.S. 86, 103 (1949). De Haro v. United States, 72 U.S. (5 Wall.) 599, 627 (1866) holds that a license is a privilege "**revocable at the pleasure** of the party making it." (emphasis added) President Taylor "revoked" the privilege. (PA 565). See, Harris v. Gillingham, 6 N.H. 9, 23 Am.Dec. 701, 702 (1832) (grant of permission was a "**license** to occupy it, at least **during the pleasure** of the owner"); See also,

---

[18] 1 R.Rotunda & J. Nowak, Treatise on Constitutional Law, Substance and Procedure 2d, § 6.7, at 516 (1992).

[19] Andrew Jackson in 1817 wrote urging Congress to use its power over Indians to legislate "to prescribe their bounds at pleasure...", precisely what the 1837 treaty accomplished. Francis Paul Prucha, American Indian Treaties, The History of a Political Anomaly, 153 (1994) (citing Jackson's correspondence).

Minneapolis Mill Co. v. Minneapolis & St. Louis Ry. Co., 53 N.W. 639, 641 (Minn. 1892) ("[a] licensee is conclusively presumed, as a matter of law, to know that a license is revocable at the pleasure of the licensor. . ."). This analysis of the 1837 treaty privilege as a "revocable license" is not new. Mole Lake Band v. United States, 139 F.Supp. 938, 940 (Ct. Cl. 1956), cert. den., 352 U.S. 892.[20]

B. An Examination of the Historical Context Confirms Congress' Intent was Consistent with the Plain Meaning of the 1837 Treaty.

The relevant historical context confirms that the 1837 treaty provided for a temporary privilege, or license, revocable at the will of the President. The record of treaty negotiations contains an explanation of the privilege from the chief negotiator for the United States, Wisconsin Territorial Governor Henry Dodge:

> I will make known to your Great Father, your request to be **permitted** to make sugar, on the lands; and you will be **allowed**, during his pleasure, to hunt and fish on them. It will probably be many years, before your Great Father will want all these lands for the use of his white Children.

1837 Treaty Journal (JA 78)(emphasis added).

Governor Dodge's careful explanation that the Chippewa's use would be "permitted" and "allowed" fairly explains a permissive license. De Haro, 72 U.S. at 624-25. Dodge's statement occurred just after Flatmouth described how the

[20] "**License is defined as a** relationship between two or more persons with respect to the use of a tract of land, in which there is nothing more than a **revokable privilege** by one of them to be upon the land,. . ."

Thompson on Real Property, Thomas Edition, §64.02(a), at 7 (Thomas ed. 1994)(emphasis added).

Chippewa gave a "privilege [to whites]. . .of cutting timber on some of their lands," showing this concept of temporary permission was understood. (JA 77).

Dodge's statement demonstrates three salient points. First, the duration was finite, and its length uncertain: "probably be many years." Second, the Great Father alone would make the decision as to when the privilege would end: "during his pleasure." Third, when he decided, the President would prefer the settlement interests of his "white Children" when he revoked the hunting and fishing privilege. This is what occurred. (See, Newell, JA 943-962, 976-991).[21]

The understanding of the Nation's Chief Executive relatively contemporaneous to the Treaty is "clear evidence of the understanding at the time." Hagen v. Utah, 510 U.S. 399, 420 (1994).[22] When President Zachary Taylor issued his Executive Order in 1850 revoking the privilege, he referred to it

[21] The district court found that the Indians' understanding of the 1837 treaty was modified by assurances allegedly given to the Wisconsin Bands during the 1842 treaty negotiations (JA 1066; PA 242). The fundamental error of finding a "misbehavior" standard for revocation in the 1837 treaty from the 1842 treaty (PA 242) originated from United States v. Bouchard, 464 F.Supp. 1316, 1349 (W.D. Wis. 1978) aff'd in part and rev'd in part sub nom. Lac Courte Oreilles Band v. Voigt, 700 F.2d 341, 356 (CA7 1983) (LCO I), cert. denied, 464 U.S. 805 (1983). The 1842 treaty, not at issue in this litigation, applies to upper Michigan and Wisconsin. Nothing from the 1842 treaty modifies the 1837 treaty's terms. The trial court erroneously relied upon the flawed analysis from Bouchard and LCO I (PA 304). The 8th Circuit's decision never reaches this issue.

"Removal" and "misbehavior" also arose even later from the Mille Lacs Band's argument, based on an 1863 treaty, that the Band was entitled to damages resulting from settlement of certain parts of their reservation prior to the 1889 Nelson Act's (25 Stat. 642 [PA 535]) reservation cession (JA 1901-02); United States v. Mille Lacs Band of Chippewa Indians, 229 U.S. 498, 33 S.Ct. 811, 813 (1913).

[22] See, Rosebud Sioux Tribe v. Kniep, 430 U.S. 584, 602 (1977) ["unambiguous, contemporaneous, statement by the Nation's Chief Executive."].

as "granted temporarily." (PA 565). Congress ratified President Taylor's 1850 Order by appropriating funds to carry out its terms. (PA 525, 530).

C. The President's 1850 Executive Order Revoking the 1837 Treaty Privilege was Effective, and Judicial Review is Not Available.

On February 6, 1850, President Zachary Taylor issued his Executive Order as follows:

> The privileges granted temporarily to the Chippewa Indians of the Mississippi, by the Fifth Article of the Treaty made with them on the 29th of July, 1837, 'of hunting, fishing and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded' by that Treaty to the United States;... are hereby revoked

(PA 565). President Taylor's Executive Order also revoked the hunting rights granted the Chippewa by the 1842 treaty, and ordered all Indians remaining on the lands ceded to remove to their unceded lands. (PA 565).

President Taylor's 1850 Order revoking the hunting and fishing privilege was expressly authorized by Congress in the 1837 treaty.

> When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum.... In these circumstances... he maybe said... to personify the federal sovereignty.... [The executive action] "would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it."

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635-37 (1952) (Jackson J. concurring). While citing to the Youngstown standard for challenging an executive order, the lower courts found (1) that the President lacked authority to revoke the hunting and fishing privilege because (2) he lacked authority to remove the Chippewa from their ceded lands. (PA 23-27). This analysis, based upon the 1830 Removal Act, 4 Stat. 411 (JA 20), is both erroneous as to the Removal Act and misplaced as to the 1837 treaty.

No limitations were placed by Congress on the President's power to revoke the Chippewas' privilege under the 1837 treaty - the President could revoke at his pleasure. Separation of powers mandates that the judiciary exercise restraint and deference to the political branches of government regarding Indian treaties. Choctaw & Chickasaw Nations, 179 U.S. at 532-6. The President was delegated the authority to decide in his discretion when the privilege would end, and the 1850 Executive Order is not unconstitutional. Judicial restraint requires that the inquiry end if the President's Order is constitutional. Congress delegated to the President, not the courts, the power to determine the duration of the privilege.

> [W]here a statute . . . commits decision making to the discretion of the President, judicial review of the President's decision is not available.

Dalton v. Specter, 511 U.S. 462, 477 (1994). This is particularly true in Indian affairs where Congress exercises plenary power.

D. The 1830 Removal Act Cannot Void the President's Action Pursuant to the 1837 Treaty.

1. The 1830 Removal Act is Inapplicable to an Executive Order Revoking a Hunting and Fishing Privilege Pursuant to a Treaty Whereby the Chippewa Retained Contiguous, Unceded Lands Including Lands East of the Mississippi.

The Circuit Court utilized the 1830 Removal Act (JA 20) to negate President Taylor's Order revoking the 1837 privilege. (PA 23-27).

> The 1830 Removal Act authorized the President to convey land west of the Mississippi to 'such tribes or nations of Indians as may choose to exchange the lands where they now reside, and remove there.'

Mille Lacs V, (PA 24) (citing 1830 Removal Act)(emphasis in original). The lower courts determined the 1837 treaty wasn't a removal treaty (PA 21, n. 18, JA 1018), but still required President Taylor to comply with the 1830 Removal Act to revoke the 1837 privilege.

Congress, by passage of the 1830 Removal Act, did not bind itself or the President to only one methodology for future land acquisition from the Indians. A later treaty, or act of Congress, can modify a former statute.[23] Numerous other treaties were negotiated during this time period that were not subject to the 1830 Removal Act. Cohen, p. 79, n. 143 ("treaties were concluded. . .to reduce the size of [tribes'] ancient domains. . .") The President had authority from the 1837 treaty to remove the Chippewa to their unceded lands (JA 1069-70, 1077-79) and Congress ratified the 1850 Order by subsequent appropriations. (PA 525, 530).

The 1830 Removal Act[24] was designed to provide authority for the **conveyance** of lands west of the Mississippi **in exchange** for lands where Indians now resided. (JA 1048). Moreover, the lands "west of the river Mississippi" which were to be exchanged with the Indians under the Removal Act were lands not part of a "state or organized territory, and to which the Indian title has been extinguished. . ." 4 Stat. 411. The Chippewa ceded lands in 1837 and 1842, but in 1850 retained contiguous, unceded lands both west and **east** of the Mississippi.[25] (JA 621).

The 1850 Order did not implicate the 1830 Removal Act because there was no exchange of lands. The President ordered that the Chippewa "remove to their unceded lands" (PA 565). Consent was obtained by the 1837 treaty by which the Chippewa agreed that they would enjoy a privilege to hunt, fish and gather wild rice upon the lands ceded during the pleasure of the President. A necessary corollary of this treaty language is that the Bands would lose their "permission" for occupancy and could be ordered to remove when the President revoked the privilege. (See, JA 954-55).

---

[23] The Last in Time doctrine holds that a later treaty modifies or supersedes a prior Act of Congress, and vice versa. In re Cherokee Tobacco, 78 U.S. (11 Wall.) 616, 620-621 (1870); Edye v. Robertson, 112 U.S. 580, 597-599 (1884); Ward v. Race Horse, 163 U.S. 504, 511 (1896).

[24] The common name "Removal Act" for 4 Stat. 411 is a misnomer which perhaps influenced the erroneous analysis below. By its own terms and preamble, the Act should be referred to as the 1830 Land Exchange and Removal Act. Congress used the preamble containing these two key features in its description at 25 U.S.C. § 174.

[25] Documents of United States Indian Policy, 79 (Francis Paul Prucha ed., 2d ed. expanded 1990) (citing, Indian Commissioner Medill, Annual Report of the Commissioner of Indian Affairs, Nov. 30, 1848).

2. Revoking the Privilege Was Entirely Consistent with the Policies Underlying the Removal Act, Even Without Removal, Since the Companion Policy to the Removal Act Dictated that the Indians Who Remained Would be Subject to State and Territorial Laws.

The Circuit Court failed to recognize that the underlying policy which drove the Indian removal policy arose from the assertion of state law over the Indian tribes who did not remove. (JA 25). The "Removal Act" is described by the Circuit Court as "entirely permissive" (PA 24), but the full quote from the source cited is as follows:

> [T]he [Removal] act. . .was entirely permissive. But the weapons to enforce removal had been forged: the denial by the executive of local Indian sovereignty hitherto recognized in solemn treaties made with the United States, and the threat of state and individual action, which Jackson implied he was powerless to prevent."

Wilcomb E. Washburn, 3 The American Indian and the United States: A Documentary History, 2169 (1973); (see JA 20). This error is compounded when the Circuit Court cites selectively from President Jackson's 1829 State of the Union Message without acknowledging the companion policy to removal. The following quote begins with the sentence from the Circuit Court's opinion (PA 24) and concludes with the companion policy omitted in the circuit court's analysis:

> This emigration should be voluntary, for it would be as cruel and unjust to compel the aborigines to abandon the graves of their fathers and seek a home in a distant land. But they should be distinctly informed that if **they remain within the limits of the States they must be subject to their laws.**

1 The State of the Union Messages of the Presidents, 1790-1966, at 310 (Fred L. Israel ed., 1966) (emphasis added); see, Cohen, pp. 81-83.[26]

One of two things must be true: either the 1837 treaty granted the Chippewa a hunting and fishing **privilege** subject to state regulation;[27] or, President Taylor had a valid reason, other than removal, to revoke the 1837 privilege -- resolution of the sovereignty conflict between Minnesota and the Chippewa.

The privilege was revoked, under authority of the 1837 treaty, to eliminate any claim that there existed special hunting and fishing rights for the Chippewa that were not subject to territorial/state regulation.[28] Revocation furthered the policy which drove the 1830 Removal Act, and avoided the grave constitutional crisis of Worchester v. Georgia, 31 U.S. (6 Pet.) 515. (JA 952).

E. The President Had Numerous Reasons to Revoke the Privilege in 1850, and His Policy Choices Must be Upheld.

The Circuit Court held as follows:

---

[26] "Amendments [to the 1830 Removal Act] were defeated that would have guaranteed the Indians protection from the states and adherence to treaty rights until removal was completed."

Cohen, p. 81, n. 161 (citation omitted).

[27] See, (JA 1445-47); Klamath, 473 U.S. at 768-69; Kennedy v. Becker, 241 U.S. 556, 562 (1916).

[28] Jackson's source for state regulatory control over the Indians was the equal footing doctrine. Id., State of the Union Messages at 309. Compare, Martin Van Buren's second State of the Union Message in 1838 where he states: "By the treaties made and ratified with. . . the Chippewas. . . during [1837] the Indian title to 18,458,000 acres has been extinguished. . ." Id. at 510-11.

> A strong argument could be made (although it is not) that the President would have issued a revocation order without the removal provision, because it would have "encouraged" Bands to remove from the ceded territory without actually ordering them to do so. If the Bands were denied their rights to hunt, fish and gather... [they] would be forced to remove.

(PA 29). If a "strong argument" can be made that supports the Executive Order by the President, the burden of persuasion on the Bands becomes nearly insurmountable under Youngstown, 343 U.S. at 635-37. See, Dalton v. Specter, 511 U.S. 462 (1994).

If there was no authority to remove the Indians under the 1837 treaty, as the Circuit Court found, then the President's ability to revoke the privilege at his pleasure cannot depend upon removal. To avoid this infirmity, the Circuit Court professed that there was no other reason to issue the 1850 Executive Order except removal.

Under Youngstown and Dalton, the policy reasons for the 1850 Order are not reviewable by the court, because that substitutes the court's judgment for a President's decision expressly authorized by Congress. Deference to the President, the reality of 19th Century communications, and the nature of the political process, means wide latitude must be given by the courts to a President acting upon information communicated to him from the American frontier.

These facts were available to President Taylor in 1850. The Minnesota Territorial Legislature passed a resolution requesting revocation of the privilege. (PA 566). Territorial Governor Ramsey and COIA Brown presented information to the President on Indian depredations (JA 1132-36; 1052), and Commissioner of Indian Affairs Medill provided information on settlement pressures in Wisconsin (PA 244).[29] Even if the

[29] For population statistics, see note 10, supra.

Minnesota Legislature, Ramsey, and Medill were wrong, it doesn't matter. The President was entitled to act to eliminate the privilege in an area that would soon be subject to increased settlement. The President eliminated the privilege because he reasonably anticipated that settlement would bring settlers into conflict with the Chippewa over the utilization of natural resources and the use of the land. (JA 1412, 1637, 1443, 1130-32). For example, the Chippewa killed two lumbermen over the construction of a dam built in 1849 at the mouth of the Rum River at Lake Mille Lacs which was flooding wild rice crops. (PA 269, JA 1197).

The 1837 treaty did not require Indian misbehavior for the President to revoke the privilege. (JA 1624). See, n. 21, supra. Settlement pressures in 1850 were accelerating due to advances in transportation from railroad technology. (JA 1442). The hunt or "chase" was incompatible with settlement (JA 1279-80; 1442-44; LA 10703-05, 10707). The survey and sale process was entering the 1837 ceded territory and land sales accelerated after 1850. (JA 1397-99, 1400-01). The Chippewa, four and five years after the 1850 Order, took reservations to save some lands for themselves in the face of advancing white settlement. (PA 490, 502). Only fifteen years after the 1850 Order, whites were encroaching on the Mille Lacs reservation, and by 1889 the United States wanted the rest of the Minnesota reservations. (PA 295-96).

To claim that there were no settlement pressures in 1850 denies the course of history. (JA 1430-31, 1437-42). Historical settlement alone sufficiently validates the 1850 Order of the President revoking the privilege.

> So Congress was clearly looking at selling the lands as a means of moving people out westward. And when no land was being sold, they enacted legislation to, in a sense, open the valve of the lands.

(Squires [JA 1400]; "patents. . .were created by the federal government. . . to colonize. . .Minnesota." [JA 1402]).

Patenting the land eliminated the privilege as each parcel was sold. (JA 1409-10, 1414-16). Consider the April 1837 Opinion of the Attorney General of the United States:

> [I]n my opinion, the . . . article of the treaty . . . with the Ottawa and Chippewa Indians by which 'the Indians stipulate for the right of hunting on the lands ceded, with the other usual privileges of occupancy until the land is required for settlement,' must be regarded as reserving the use of the ceded land for all the purposes of Indian occupancy as it existed prior to the treaty until such lands shall have been actually disposed of to individuals by the United States. Such disposition may be made by sale under the general laws, or by special grants, or in any other way that Congress may direct; and whenever an actual disposition of any particular tract shall be made, the usufructuary right of the Indians will cease as to such tract.

(JA 40-41) (emphasis in original).

The settlement process extinguished the privilege. See Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin (LCO II), 760 F.2d 177, 182 (CA7 1985).

> The very fact that patents were granted conveying title to private individuals is an indication that our government did not construe [the 1837 and 1855] treaties as reserving hunting, fishing or any other rights to the Indians.

State v. Keezer, 292 N.W.2d 714, 721, fn. 10 (Minn. 1980), cert. denied, 450 U.S. 930 (1981). Patents issued by the President, granting all rights and privileges forever, revoked the 1837 treaty privilege as an additional expression of the President's

pleasure.[30] (See n. 9, supra; PA 549). The advantage of the 1850 Order was that it cleared the privilege from all ceded lands. The 1850 Order's purpose of encouraging settlement was not illegal or unconstitutional, and was contemplated by the 1837 treaty.

F. The Revocation Portion of the 1850 Order is Severable.

The Circuit Court acknowledged a strong argument could be made that the President would have issued the revocation order in 1850 without the removal provision in order to encourage the Bands to remove from the ceded territory. Despite this, the Circuit Court concluded that the revocation portion of the Order could not be severed from the removal provision because the only purpose of the Order was to mandate removal (PA 28-29). This analysis fails to recognize that the 1850 Executive Order can be severed into distinct provisions:

(1) Revocation of the 1837 hunting and fishing privilege.
(2) Revocation of the 1842 treaty's right to hunt.
(3) An order requiring the Bands to remove from the ceded territories in both treaties to their unceded lands.[31]

One reason for ordering removal in 1850 arose from the **1842 treaty** which provided "for the right of hunting on the ceded territory. . .until [the Indians] were required to remove by the President. . ." (PA 242). The 1837 treaty did not require removal for privilege revocation. (JA 145).

A compelling reason why the revocation portion of the Order can be severed from the removal portion is simply this: of the twelve Bands signatory to the 1837 treaty, the majority

---

[30] "[T]he President was given enormous power in the land alienation process." (JA 1407-08; 1906-22).

[31] Two Band experts testified that the 1850 Order grammatically has separate clauses. (JA 1182, 1115).

resided outside of the 1837 ceded territory. (PA 487-89; JA 1618, 131-33, 621). An Order for revocation of the 1837 hunting and fishing privilege, even without removal, cleared both resident and non-resident Chippewa claims, demonstrating that the removal portion of the Order can be severed.[32] The analysis is the same for severing an Executive Order as severing a statute. Matter of Reyes, 910 F.2d 611, 613 (CA9 1990).

> The unconstitutionality of a part of an Act does not necessarily defeat or affect the validity of its remaining provisions. Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as law.

Champlin Rfg. Co. v. Corporation Comm'n, 286 U.S. 210, 234 (1932). The removal component of the Order can be dropped because the President could revoke the privilege independent of ordering removal; in fact, he did precisely this by revoking the privilege for Chippewa Bands residing outside the 1837 ceded territory.

The revocation portion of the 1850 Executive Order is expressly authorized by the 1837 treaty, constitutional and fully operative as law. The severability standard here mirrors the analysis from Dalton v. Specter, 511 U.S. 462, and judicial review of the President's authority exercised pursuant to an express delegation from Congress ends at this point.

---

[32] For these same reasons, the trial court's findings, which the Circuit Court did not reach, that removal was suspended and that the federal government changed its policy in the 1850s from a removal policy to a reservation policy, granting the Chippewa Bands reservations under the 1854 and 1855 treaties, are irrelevant. No Executive Order repealed the President's Order revoking the 1837 treaty privilege (PA 401-02; JA 1113, 1117).

III. THE 1855 TREATY CEDED ANY REMAINING CLAIM TO THE 1837 PRIVILEGE.

A. Factual Background of the 1855 Treaty.

The Authorizing Act for the 1855 treaty provides:

> The laws of the United States and the Territory of Minnesota shall be extended over the Chippewa Territory whenever it may be ceded, and the same shall cease to be 'Indian Country'. . .

Act of Dec. 19, 1854, 10 Stat. 598 (PA 533). By extending territorial law over former Indian Country, Congress expressly revoked any Chippewa interests and sovereign control over the ceded lands. Congress' intent was carried out in the 1855 treaty using the "express language of cession."[33] The 1855 treaty, after conveying a specific tract of land, eliminates every possible interest of the Chippewa in and to lands in Minnesota or elsewhere:

> And the said Indians do further fully and entirely relinquish and convey to the United States, any and all right, title, and interest, of whatsoever nature the same may be, which they may now have in, and to any other lands in the Territory of Minnesota or elsewhere.

Treaty with the Chippewa, 10 Stat. 1165 (1855), Art. 1 (PA 503; thorough review by Newell, JA 992-1007).

---

[33] Solem v. Bartlett, 465 U.S. 463, 469, n. 10 (1984); Klamath, 473 U.S. 768, n. 19.

B. The Express Language of Cession Relinquished the 1837 Privilege.

The Klamath decision affirmed United States v. Minnesota, 466 F.Supp. 1382, 1385 (D. Minn. 1979), aff'd sub nom. Red Lake Band of Chippewa Indians v. Minnesota, 614 F.2d 1161 (CA8 1980), cert. denied, 449 U.S. 905 (1980). Both cases held that the express language of cession is "precisely suited" to extinguish all hunting and fishing rights or privileges. The Circuit Court ignored their own precedent in Red Lake, even though Red Lake cites to what the United States told the Mille Lacs Band in 1889: **off-reservation hunting is "a matter for the Legislature of the State to determine."** See supra, pp. 10-11; United States v. Minnesota, 466 F.Supp. 1387.

The Circuit Court attempts to distinguish Klamath on the basis that the 1855 treaty language was not "explicit" (PA 36) in revoking the 1837 privilege. Klamath rejected the need for a specific reference to the hunting and fishing privilege given the express language of cession. Klamath, 473 U.S. 763-64, 768. The Circuit Court stated the test backwards. The proper test is whether the hunting and fishing privilege was explicitly reserved at the time all interests were conveyed by the express language of cession. Id. 772-73.

The Eighth Circuit erroneously limited Klamath to **exclusive on-reservation rights** versus **non-exclusive off-reservation rights**. (PA 39). Exclusive on-reservation rights are subject to a more stringent extinguishment test than a non-exclusive, temporary, off-reservation privilege. Both exclusive rights and non-exclusive privileges are interests in or to land, and are eliminated by the express language of cession. Klamath, 473 U.S. 768.

> Even if the tribe had expressly reserved a 'privilege of fishing and hunting' on the ceded lands, our precedents demonstrate that such an express reservation would not suffice to defeat the State's power to reasonably and even handedly regulate such activity.

Klamath, 473 U.S. at 768-769 (citing, Kennedy v. Becker, 241 U.S. 556 (1916)).

C. The 1837 Treaty Privilege is an Interest in or to Land, Not an Immunity or Regulatory Right.

No flaw is greater than the attempt by the Bands to recast this hunting, fishing and gathering **privilege** from an interest in or to land, to a "regulatory right" (PA 333-34) contrary to this Court's decisions in Kennedy v. Becker, 241 U.S. at 562, and Klamath, 473 U.S. at 753. The Klamath Tribe's Supreme Court brief argued "[a] Right To Hunt And Fish Free Of State Regulation May Exist Apart From An Ownership or Possessory Interest In The Land" (JA 1852). This argument, rejected by Klamath, has found new life in Mille Lacs.

The 1855 treaty relinquished "all interests in and to land." To avoid Klamath, the District Court adopted an analysis that this treaty privilege must be something new, a regulatory right or immunity from law (PA 333-34). This is the same argument advanced by the Klamath Tribe to the United States Supreme Court:

> [T]he *Red Lake* court made no distinction between the right to hunt and fish free of state regulation (a regulatory right) and the right to enter upon private land to hunt and fish over the landowners' objection (a property right). Indeed, the entire *Red Lake* analysis is premised on the characterization of the property right asserted by the Indians as an interest in property. . .. As the tribe has demonstrated, however, Indian hunting and fishing rights are a hybrid mixture of proprietary and jurisdictional interests and thus **a right to hunt and fish free of state regulation is a right separate and apart from an interest in the property itself.**

(Klamath Tribe's Brief, JA 1859 (emphasis added)). That argument was wrong then, and it is wrong now.

The Klamath Tribe's brief relied upon a 1976 Law Review Article by Thomas Lund entitled, "Early American Wildlife Law," 51 N.Y.U.L. Rev. 703 (1976) (JA 1853) to support the argument that the Klamath Tribe could cede all of their interests in and to land, and still retain a "regulatory" right. In this case, Professor Thomas Lund testified as a "wildlife law" expert that the 1837 privilege to hunt, fish and gather wild rice was not an interest in land, but rather was a freedom from state law, except for state trespass law. (PA 332).

> The fallacy in [Lund's] argument is that the courts have held reserved usufructuary rights to be **interests related to** land since at least 1905, when the Supreme Court decided United States v. Winans, [198 U.S. 371 (1905)]. . ."

Menominee Indian Tribe of Wisconsin v. Thompson, 943 F.Supp. 999, 1018 (W.D. Wis. 1996) (emphasis added). The common law[34] establishes that a right to hunt and fish is an interest in or to land. (JA 1410-11).

(a) A right to hunt and fish can be a profit a prendre.[35]

(b) A privilege is a license under real property law.[36]

---

[34] Treaties were drawn with the common law and real property concepts in mind. The treaty drafters understood "the modes and forms of creating the various technical estates known to their law..." Jones v. Meehan, 175 U.S. 1, 11 (1899).

[35] Kennedy v. Becker, 241 U.S. at 562; State v. Mallory, 83 S.W. 955, 959 (Ark. 1904) ("The cases all hold that [a right to take game] is a right inhering in the soil, and not a mere right to prevent the invasion of the possession of the owner."); Hanson v. Fergus Falls Nat'l Bank, 65 N.W.2d 857 (Minn. 1954); Webber v. Lee, 51 L.J.Q.B. 485 (1882).

[36] See pp. 18-20, supra; "Such a revocable privilege is an 'interest in land'. . ." 4 Richard R. Powell & Patrick J. Rohan, Powell on Real Property, §34.25, at 34-300 (1998). "A license is revocable by any manifestation of the licensor's intent to end it. . . . A license ends on the . . . conveyance of the servient estate by the licensor" Id. at 34-301 to 34-303. (See, JA 1409-10).

A privilege to hunt and fish can be held separate from land ownership, but that argument is a diversion. Klamath, 473 U.S. at 765-66. Full fee title includes all rights, "assets to land," and profits a prendre, including a privilege to hunt and fish. (JA 1526; Real Estate Appraiser Hanson, JA 1529-31; Historical Geographer Squires, JA 1409-11). A privilege to hunt, fish and gather wild rice [a "profit" of the land], is an interest in or to land. Compare, (JA 1197). South Dakota v. Yankton Sioux Tribe, 522 U.S. ____, 118 S.Ct. 789 (1998) holds that a tribe lacks regulatory and adjudicatory authority over lands that have been sold. Once all interests in and to land were conveyed by the 1855 treaty, the 1837 treaty privilege was also conveyed and lost.

D. The 1855 Treaty Terms are Consistent with Privilege Relinquishment.

The Circuit Court found that neither the United States nor the bands intended to revoke the hunting and fishing privilege by the 1855 treaty because the 1837 treaty privilege was not specifically mentioned in the 1855 treaty or its journal. The same finding by the Ninth Circuit in Klamath was insufficient given the express language of cession. Id., 473 U.S. at 763-64, 768.

> [E]ven Indian treaties cannot be rewritten or expanded beyond their clear terms to remedy a claimed injustice **or to achieve the asserted understanding of the parties.**

Choctaw Nation of Indians v. United States, 318 U.S. 423, 432 (1943)(emphasis added).

It is untenable to claim that the United States did not intend to eliminate the 1837 treaty privilege by the 1855 treaty given the directive from Congress in the 1854 Authorizing Act that the ceded land would cease to be "Indian Country" (PA 533),

coupled with the express language of cession in the 1855 treaty (PA 503).

Providing traps and guns to the Chippewa in the 1855 treaty is irrelevant to determining whether the Chippewa would hunt and fish without regard to state law. The Chippewa could continue to hunt and fish on the reservation, and they would be able to hunt and fish off reservation in accordance with state laws and regulations. (See, Menominee, 943 F.Supp. at 108; JA 1198) [both Indians and non-Indians hunted and fished after 1855].

Finally, the 1855 treaty provides in Article 9 as follows:

> And [the Chippewa] also stipulate that they will settle down in the peaceful pursuits of life, commence the cultivation of the soil, and appropriate their means to the erection of houses, opening farms, the education of their children, and such other objects of improvement and convenience, as are incident to a well-regulated society...

(PA 513).[37] Unquestionably, the 1855 treaty relinquished any claims based on the 1837 treaty privilege.

---

[37] This provision echoes the 1855 treaty negotiations:

"**COIA Manypenny**. . . So long as the red man relies upon the precarious subsistence afforded by the chace[sic], so long he will remain ignorant of the advantage of industry and civilization -- so long will the Indians decrease and diminish in numbers. Let them but once learn to depend upon the cultivation of the earth for their support, and education, improvement and independence will follow; and then they can accomplish for themselves all that excited their wonder and admiration on their way to Washington.

Hole-In-The-Day. . . That is true, very true."

(1855 Treaty Negotiations, JA 298-99).

IV. THE 1837 TREATY PRIVILEGE WAS EXTINGUISHED NO LATER THAN 1858 WHEN CONGRESS PASSED LEGISLATION ENABLING MINNESOTA TO JOIN THE UNION ON AN EQUAL FOOTING WITH THE ORIGINAL THIRTEEN STATES.

A. Congress Did Not Intend the 1837 Treaty Privilege to Operate as an Immunity from Future State Laws.

The injunction entered by the lower courts diminishes Minnesota's sovereignty by exempting Band members from Minnesota's laws regulating the manner of harvest. The lower courts approved a separate Conservation Code of 117 pages (excluding protocols) for Chippewa hunting and fishing under a different conservation standard.[38] The Band Code allows for longer seasons, larger limits, and different methods of harvest. This necessitates changes in the State's regulatory scheme, disrupting the state's natural resources management practices, and usurping its management and police powers.[39] Put simply, the State has been ordered to accept co-management authority with the Bands in a twelve county area, as enforced and supervised in perpetuity by the federal court.

The district court departed from established principles by refusing to classify the 1837 privilege as a real property interest. The trial court held "a sovereign [the United States] could

---

[38] In order for Minnesota to include a regulation in the Band Hunting and Fishing Code, it had to "put forth specific evidence establishing why the regulation is a measure '**to forestall the imminence of extinction**'" (Mille Lacs IV, PA 119) (emphasis added) (citing, United States v. Oregon, 718 F.2d 299, 305 (CA9 1983)).

[39] In order for Minnesota to enforce a public health and safety regulation against the Bands, the State must affirmatively demonstrate that the regulation meets a three part test. (PA 345).

convey an **exemption from regulation**. . .," and "**its ability to regulate** taking of the wildlife it owns." (PA 333-34) (emphasis added).[40] North American Comm. Co. v. United States, 171 U.S. 110 (1898) held that the "regulation [of seal fisheries] involved the exercise of power as sovereign and not as a mere proprietor. Such governmental powers cannot be contracted away. . .." Id. at 137. Compare, Ward, 163 U.S. at 511-12, 514.

The trial court found that the United States ceded its power to regulate wildlife to the Chippewa, a holding without precedent. If true, the Chippewa are exercising powers and immunities from the United States, implicating profound constitutional issues under the equal footing doctrine and Tenth Amendment. Congress did not intend to grant its sovereign abilities and a regulatory exemption to the Chippewa.[41] (JA 1446). Indian land cessions impact the scope of regulatory authority.[42] The Bands understood that land cession treaties specified that the party owning the land would regulate land use.[43] See, note 4, infra and 1825 Treaty of Prairie du Chien, art. 5, 7 Stat. 272.

---

[40] While finding the United States could convey this "regulatory privilege" to wildlife it owned, the trial court simultaneously agreed that "Minnesota owns wildlife in trust for all its citizens." (PA 333, n. 22). See, discussion of wildlife "ownership" in Crow Tribe of Indians v. Repsis, 73 F.3d 982, 989-90 (CA10 1995), cert. denied 517 U.S. 1221 (1996); see also, Ward v. Race Horse, 163 U.S. at 507; State v. Rodman, 59 N.W. 1098 (Minn. 1894); State ex rel. Ohsman & Sons Company, Inc. v. Starkweather, 7 N.W.2d 747 (Minn. 1943).

[41] See, JA 1445-46; Solicitor for the Dept. of the Interior (Vol. 54, Decisions of the Department of the Interior, p. 418, 1934, JA 1814-18).

[42] In South Dakota v. Yankton Sioux Tribe, 522 U.S. ____, 118 S.Ct. 789 (1998), the Court concluded that the tribe lacked regulatory and adjudicatory authority over former reservation lands that had been sold.

[43] As non-citizens in 1837, after the land sale, Band members did not hold the privilege to hunt and fish **at all**, absent the 1837 treaty privilege. (JA 1211-12); Elk v. Wilkins, 112 U.S. 94, 123 (1884).

When Congress intended to exempt Bands from the application of future state law, the federal government included a specific statement to that effect in the treaty. The Cherokee and Choctaw moved from Georgia and Mississippi to lands which were not part of an organized territory[44], pursuant to the 1830 treaty which provided:

> no Territory or State shall ever have a right to pass laws for the government of the Choctaw Nation. . .

7 Stat. 333-334 (1830) (as cited in, Choctaw Nation v. Oklahoma, 397 U.S. 620, 625 (1970)). (See pp. 24-25, supra, for forces surrounding this treaty.)

B. The Treaty Privilege was Temporary, and Even if Deemed a Regulatory Privilege, It Cannot Survive Statehood and Restrict Minnesota under Ward and Repsis.

Any "regulatory privilege" must be intended by Congress to be permanent in order to restrict the subsequent state. Ward v. Race Horse, 163 U.S. 504 (1896); Crow Tribe of Indians v. Repsis, 73 F.3d 982 (CA10 1995).

> They shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts.

(Treaty with the Crow Indians of May 7, 1868, art. 4, 15 Stat. 649) This language "contemplated the disappearance of the

---

[44] The Choctaw and Cherokee moved to what became the State of Oklahoma 76 years later. 34 Stat. 270 (1906).

conditions specified in the treaty and was thus temporary" and extinguished by statehood. Repsis at 988.

The 1837 treaty text said the privilege would last "during the pleasure of the President". "The most probative evidence. . . is of course the statutory language. . . ." Hagen v. Utah, 510 U.S. at 411. In 1850, President Taylor specifically referred to the 1837 privilege as "granted temporarily" (PA 565). This 1850 decision by the President, given the powers delegated in the 1837 treaty, transformed the privilege to "temporary" for the equal footing doctrine, regardless of the nature of the privilege previously. Compare, Hagen, 510 U.S. at 420. The language "during the pleasure of the President" is **permissive** (JA 78) and more temporary and precarious[45] than the treaty language at issue in Repsis and Ward, which is **conditional**.[46]

There were three express conditions for the continued hunting right in the Repsis treaty. Game must be found on the lands, peace had to subsist, and there had to be unoccupied lands of the United States. In contrast, the discretion granted to the President in the 1837 treaty was not conditioned by anything. In Ward, Congress contemplated that there would no longer be "unoccupied lands" of the United States in the future, so the right was temporary. The analysis ended there. Ward did not require that either of the other two conditions would end or be met. This is a highly salient point for this case. If it was anticipated that any of the conditions, imposed by the trial court, for cessation of the 1837 treaty privilege would occur, the

[45] So precarious it had been revoked by Executive Order (PA 565) prior to statehood.

[46] (Ethno-historian Clifton analyzed the 364 ratified Indian treaties. (JA 1622). The 1837 treaty is one of thirteen treaties which created a "permissive" limitation on hunting and fishing rights. (JA 1626). Other types include conditional (JA 1623-26) and, most common, time certain (JA 1623).

privilege is temporary and did not bind the future state regardless of other conditions.[47]

Relying erroneously upon the **1842** treaty negotiations, the district court found "that it would be a long time until they were removed and they could remain on their lands for an indefinite time" (PA 242). Whether the years between 1837 and 1850 was "a long time" is irrelevant, since a "long time" is still temporary. Moreover, the finding that the privilege was "indefinite" means it was temporary.[48]

These Chippewa Bands were told the privilege would end when the "Great Father will want all these lands for his white Children" (JA 78). Minnesota's statehood meets this condition of wanting all the lands for citizens. Ward, 163 U.S. at 509-10. Whether "probably many years" (JA 78) or "remain. . .for many years" (PA 314) or "indefinite" (PA 242), each is dispositive as to the temporary nature of the privilege under Ward and Repsis since the parties "contemplated disappearance of the conditions specified." Repsis at 988.[49]

[47] Ward and Repsis stand for the proposition that **conditional** treaties grant temporary rights. The district court conditioned privilege revocation on misbehavior (PA 314) based on "Indian understanding." The trial court's "misbehavior" condition for revocation is indistinguishable from "as long as peace subsists" from the Ward and Repsis treaties.

[48] Twisdale v. Womack & Martel, 148 So.2d 21, 23 (Fla. 1962) ("indefinite" found to be more synonymous with temporary than with permanent and contemplates the condition to end at an unpredictable time); Savage v. S. Dist. Co., 228 S.W.2d 122, 124 (Tenn. App. 1949) ("indefinite" meant terminable at will); Cline v. Southern Ry. Co., 96 S.E. 532, 538 (S.C. 1918) ("indefinite" does not mean perpetual but uncertain as to time); Com. ex rel. Green v. Court of Over & Terminer & Quarter Sessions, Erie County, 106 A.2d 896, 897 (Pa. Super. 1954); Atha v. Atha, 6 N.W.2d 897, 898 (Mich. 1942).

[49] (Clifton, JA 1626-27; Squires, JA 933-36).

The Bands' understanding that the privilege would end at settlement is also dispositive as to the temporary nature of the privilege. Discussing the claim of these Bands to hunt and fish on private land under the 1837 treaty, the Seventh Circuit stated:

> We find that the claim is inconsistent with the Indian's understanding at the time of the cession treaties that their rights could be limited if the land were needed for white settlement. . . .

Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt (LCO I), 700 F.2d 341, 365, n.14 (CA7 1983). "[T]hey could continue to use the land outside their reservations for hunting and so forth until the time came when their using it would impede occupation by white settlers." Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin (LCO II), 760 F.2d 177, 224 (CA7 1985). "We regard 'settlement' by non-Indians as being synonymous with 'private' ownership," (LCO II), 760 F.2d at 183.

These findings from LCO establish settlement[50] as a condition for cessation of the privilege contemplated by the parties. At most, the 1837 privilege was conditional, hence temporary, ending on statehood under Ward and Repsis.

C. The Treaty Privilege Was Abrogated by the Subsequent Statute Creating Minnesota as a State, Because Minnesota's Sovereignty Was Not Expressly Limited.

If a state's sovereignty can be constrained by a "regulatory" privilege, the limitation must appear in the state's enabling

[50] State v. Keezer, 292 N.W.2d 714, 721, n.10 (Minn. 1980); (Squires, JA 1413-1414, 1407); "The privileges granted in 1837 were temporary. . .[and] depended on when the ceded lands were demanded by non-Indians. . ." (Squires, JA 926-27, 933-36).

legislation.[51] Congress never provided in Minnesota's Enabling Act, 11 Stat. 285 (PA 515) that the temporary privilege would limit Minnesota's sovereignty. Federal statutes and treaties are constitutional equivalents and subsequent statutes can modify earlier treaties.[52] In order for Congress to abrogate Minnesota's sovereignty, an express statement in its enabling legislation was required because Minnesota came into the Union on equal footing with other states. Under the "last in time"[53] doctrine, the Enabling Act is a subsequent Act of Congress abrogating the 1837 privilege.

"[A]brogation of a state's Eleventh Amendment immunity turns on an **express statement of intent** by Congress and a constitutionally valid exercise of power."[54] Chavez v. Arte

[51] "[T]he rights of the State are to be determined by the act of admission rather than by any prior declaration by Congress of its purpose in respect to certain lands." Minnesota v. Hitchcock, 185 U.S. 373, 391 (1902). Given the trial court's finding that the 1837 privilege is not an interest in or to lands (PA 331-34), Winans' discussion of a "continuing" "right in the land" surviving statehood is inapplicable. Id. 198 U.S. at 381-84.

[52] "That 'a treaty may supersede a prior act of Congress, and an act of Congress supersede a prior treaty,' is elementary," Ward v. Race Horse, 163 U.S. at 511 (1896) (citing, Fong Yue Ting v. United States, 149 U.S. 698 (1893); In re Cherokee Tobacco, 78 U.S. (11 Wall.) 616, 621). Ward discussed whether a treaty right intended to last in perpetuity could bind a future state even if not contained in the enabling act, but this issue was not decided. Id., 163 U.S. 515.

[53] "Acts of Congress passed after the date of the treaty, the Court [in Whitney] held, control over the treaty terms." 1 R. Rotunda & J. Nowak, Treatise on Constitutional Law, Substance and Procedure 2d, §6.7, at 516 (1992) (citing, Whitney v. Robertson, 124 U.S. 190, 194 (1888)). This is because "[t]reaties as well as federal statutes are the supreme law of the land. . .." Id. at 515. "The last expression of the will of the sovereign controls." Id. at 516.

[54] U.S. v. Lopez, 514 U.S. 549, 551 (1995) (Gun-Free Zone Schools Act "exceeds the authority of Congress" to regulate commerce under U.S. Const. Art. I, § 8, cl. 3); City of Boerne v. Flores, ____ U.S. ____, 117

Publico Press, 139 F.3d 504, 506 (CA5 1998)(emphasis added)(citing, Seminole, 517 U.S. at 55-56). Idaho v. Coeur d' Alene Tribe of Idaho, ____ U.S. ____, 117 S.Ct. 2028, 2034 (1997) explained that Seminole Tribe of Florida v. Florida, 517 U.S. 44, 71, n. 14 (1996) "held that Congress, in the exercise of its power to regulate commerce with Indian tribes, may not abrogate state sovereign immunity." Abrogation of Minnesota's police powers, protected by the equal footing doctrine and Tenth Amendment, must be subject to this same standard. Congress was not empowered by treaty to grant the Chippewa an "exempt[ion] from. . .state game laws" which would continue after statehood, stripping Minnesota "of an essential attribute of its governmental existence," without an express provision in the Enabling Act (PA 515). Ward, 514 U.S. at 514-16.

The lower courts erroneously adopted the Bands' argument that any restraint on state power flowing from a federal treaty is constitutional and preempts the state's sovereign powers.

> The Supremacy Clause, however, makes 'Law of the Land' only 'Laws of the United States which shall be made in Pursuance [of the Constitution]'; so the Supremacy Clause merely brings us back to the question discussed earlier, whether laws conscripting state officers violates state sovereignty and are thus not in accord with the Constitution.

Printz v. United States, ____ U.S. ____, 117 S.Ct. 2365, 2379 (1997). The issue is whether the federal government has clear preemptive power when faced with competing sovereign interests and powers of the state. While Congress has plenary power over Indian tribes, it does not exercise plenary power over states.

"[T]his court has never sanctioned explicitly a federal command to the states to promulgate and enforce laws and

---

S.Ct. 2157 (1997) (even though Congress has broad enforcement powers under § 5 of the Fourteenth Amendment, those powers are not unlimited).

regulations." New York v. United States, 505 U.S. 144, 161 (1992). "[L]ater opinions of ours have made clear that the Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs" Printz, 117 S.Ct. at 2380. As interpreted and enforced by the district court, art. 5 of the 1837 treaty serves as a federal command[55] that the State adopt and implement new laws, and Minnesota must share co-management authority over natural resources with the Chippewa on lands within Minnesota's jurisdiction.[56] (LA 7633-35, 7637). This requires Minnesota to allow hunting and fishing by some Indian citizens under a separate code (LA 7453-7660), adjust its other game laws, and oversee the implementation of two sets of laws contrary to Printz and New York.

In re Cherokee Tobacco, 78 U.S. (11 Wall.) 616 (1870) held that an 1868 federal statute taxing liquor and tobacco superseded an 1866 treaty exempting the Cherokee from taxation.

> Congress not having thought proper to exclude them [Cherokee in the 1868 tax statute], it is not for this court to make the exception. If the exemption had been intended it would doubtless have been expressed. There being no room for ambiguity, there is no room for construction. It would be out of place.

---

[55] When negotiating the Band Hunting and Fishing Code, the State did not do so "voluntarily," but pursuant to the standard mandated by the district court. (PA 344-45). The state stipulated with the Bands that under the court imposed "conservation necessity" standard that the Band's code met the court imposed standard. The Circuit Court found no offense to Minnesota's sovereignty. (PA 58).

[56] For example, in Wisconsin in response to planned Chippewa treaty harvest, the state has reduced daily walleye limits for non-Band anglers by 50 to 60 percent. (LA 8184).

Id. at 621. Similarly here, it would be "out of place" for the Court to read a limitation on the State's police power into Minnesota's Enabling Act.

When the United States intends to reserve regulatory power within a future state, an explicit exception is made in the enabling legislation. Wyoming's Enabling Act, 26 Stat. 222 (1890), reserved Yellowstone Park from state regulation prior to statehood:

> that nothing in this Act contained shall repeal or effect any act of Congress relating to the Yellowstone National Park, or the reservation of the park as now defined, . . . or the power of the United States over it;. . . but exclusive legislation, in all cases whatsoever, shall be exercised by the United States, which shall have exclusive control and jurisdiction over the same. . .

Id. Sec. 2.

When Oklahoma was admitted into the Union on an equal footing with the original states, this was "conditioned on its disclaimer of all right and title to lands 'owned or held by any Indian, tribe, or nation'" (Choctaw, 397 U.S. at 627 (citing, 34 Stat. 270 (June 16, 1906)). See also, Ward, 163 U.S. at 511-514. No language in Minnesota's Enabling Act restricts its regulatory power in the 1837 cession area.

D. Minnesota's Right of Dominion and Sovereignty Are Not Diminished by the 1837 Treaty on Lands Within Minnesota's Jurisdiction.

Ward v. Race Horse controls the disposition of this case because its reasoning informs and illuminates the fundamental issues now before this Court.

Jurisdiction, sovereignty and the power to control and regulate have a geographical component -- for the State and the Bands. Just as the Bands are immune from the State's laws on

reservation lands established by treaty, "an essential attribute of [a State's] governmental existence" is sovereignty and jurisdiction over all the territory within her limits. Ward, 163 U.S. at 512, 516. Ward teaches that even if Congress could "restrict a new State in any of its necessary attributes as an independent government [or] inhibit or diminish its perfect equality with the other [states]," that diminishment of a State's sovereignty on its own lands will not occur without a clear expression of Congressional intent. Ward, 163 U.S. at 512, 515 [citing Withers v. Buckley, 61 U.S. (20 How.) 84, 97 (1857)].

When silent on limitations on the future State's powers, the Enabling Act "not only contains no expression of the intention of Congress to continue the [treaty right] in question in the State, but, on the contrary, its intention not to do so is conveyed by the express terms of the act of admission." Ward, 163 U.S. at 515. Here, the 1837 treaty privilege was repealed not only because of the conflict with the equal footing doctrine, but also because the privilege conflicts with the express terms of admission: "equal footing. . .in all respects whatever." (PA 515); Ward, 163 U.S. at 513-14.

To the trial court's finding that by virtue of the 1837 treaty the United States "convey[ed] its ability to regulate the taking of wildlife it owns" or "convey[ed] an exemption from regulation" (PA 333-34), Ward has two responses. First, the "jurisdiction. . .by the Federal government, before formation of the new State, was held temporarily and in trust for the new State. . ." Ward, 163 U.S. at 511-12. Since held in trust, the Federal jurisdiction passed to the State under the equal footing doctrine, at least if not expressly reserved in the Enabling Act. See also, Utah Div. of State Lands v. United States, 482 U.S. 193 (1987) and Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212 (1845).

Second, the claim that the federal government could "exempt. . .from state game laws each particular piece of land" the United States owns within a state is defeated by the equal footing doctrine. Ward, 163 U.S. at 514; Repsis, 73 F.3d at 990. The same result is compelled here. The trial court fashioned a

"regulatory exemption" from Minnesota's game laws on all "public" lands and waters. This piecemeal regulatory scheme is defeated because Minnesota was not admitted "with diminished governmental authority" on public lands in the 1837 ceded territory. Ward, 163 U.S. at 515.

Sound public policy and constitutional reasons support a decision that under the equal footing doctrine the 1837 treaty privilege was repealed, giving Minnesota full rights of dominion and sovereignty over the lands and waters within her borders.

CONCLUSION

For the foregoing reasons, the judgment below, holding that the 1837 treaty privilege continues to exist, should be reversed and the injunction against the State dissolved.

Respectfully submitted,

Stephen G. Froehle, Esq.
7588 Jeanne Drive
Lino Lakes, MN 55014
(651) 784-2693

GARY E. PERSIAN, ESQ.
Counsel of Record
Randy V. Thompson, Esq.
PERSIAN, MacGREGOR
& THOMPSON
1530 International Centre
900 Second Avenue South
Minneapolis, MN 55402
(612) 339-6733

Attorneys for John W. Thompson, Jenny Thompson, Joseph N. Karpen, LeRoy Burling, Glenn Thompson, Gary M. Kiedrowski, Michael Sheff and Robert L. Edmonds